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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

7 KEITH A. WARREN,

8 Plaintiff,

9 v.

10 NEVADA DEPARTMENT OF
11 CORRECTIONS, *et al.*,

12 Defendants.

Case No.: 3:17-cv-00228-MMD-WGC

ORDER

Re: ECF No. 32

13 Before the court is Plaintiff's Motion to File Second Amended Complaint (ECF No. 32),
14 to which Defendants Powers and Wickham have filed a "non-opposition." (ECF No. 35.)¹

15 The court's screening order found that Plaintiff's First Amended Complaint stated
16 colorable Eighth Amendment "failure to protect" claims and First Amendment retaliation claims
17 against Defendants Thomas, Powers and Wickham. (ECF No. 11 at 4-6.) Plaintiff's "Federal
18 Statutory Claims" were dismissed without leave to amend. (*Id.* at 6.) Plaintiff's "State law Claims"
19 were largely dismissed except for certain colorable claims premised upon Article 1, Section 9 of
20 the Nevada Constitution, which section ". . . provides free speech protections that are coextensive
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23 ¹The screening order permitted Plaintiff's causes of action to proceed against Defendants Powers and Wickham, who have appeared and answered (ECF Nos. 20 & 28). The other Defendant against whom Plaintiff's claims were allowed to proceed, Chandra Thomas, has not been served. (ECF Nos. 20, 23 & 25.)

1 with the First Amendment to the United States Constitution.” (*Id.* at 7; citation omitted.) Thus,
2 Plaintiff’s state constitutional law “retaliation claim” was allowed to proceed against the same
3 three Defendants (Thomas, Powers and Wickham). (*Id.*)

4 Plaintiff’s motion to amend states his proposed Second Amended Complaint “would cure
5 the defects within his complaint, clarify defendants and to make his [Second Amended] complaint
6 more factually accurate and concise for the court.” Plaintiff represents there would be “no
7 prejudice to Defendants ...” (ECF No. 32 at 2-3.)

8 Although Defendants Powers and Wickham have expressed a non-opposition to Plaintiff’s
9 motion to amend, the court notes Plaintiff’s proposed Second Amended Complaint seeks to add
10 eleven (11) new defendants.² While it appears the gravamen of Plaintiff’s claims in his First
11 Amended Complaint (which if they were allowed to proceed) are similar to Counts I and II of the
12 proposed Second Amended Complaint, Count III appears to assert a seemingly new claim of
13 failing to investigate the assault allegedly perpetrated against him. (ECF No. 32 at pp. 17-18.)
14 Because of the proposed addition of eleven (11) new defendants and possibly one (1) new cause
15 of action, it further appears the proposed Second Amended Complaint should be placed in line to
16 be screened.

17 While leave to amend is to be freely given under Federal Rule of Civil Procedure 15(a)(2),
18 the court need not give leave to amend where doing so is, among other things, futile or the amended
19 complaint would be subject to dismissal. *See Amerisource Bergen Corp. v. Dialysist West, Inc.*,
20 465 F.3d 946, 951 (9th Cir. 2006); *see also Carrico v. City & County of San Francisco*, 656 F.3d
21 1002, 1008 (9th Cir. 2011). As such, the non-moving party, as well as the court, should review the
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23 ² Baca, Baker, Byrne, Baza, Del Porto, Foster, Kelly, Mears, Ramirez, Tristan and Vidari. (ECF No. 32 at 4-8.)

1 proposed amended complaint to determine whether any portion of the proposed amended
2 complaint would be futile. The standard for futility is whether the proposed amended complaint
3 states a claim upon which relief may be granted, which is the same standard the court employs in
4 screening prisoner complaints under the Prison Litigation Reform Act, 28 U.S.C. § 1915A, and
5 the same standard that is utilized in a motion to dismiss under Federal Rule of Civil Procedure
6 12(b)(6).

7 Therefore, case law interpreting Rule 15 allows Defendants to oppose a motion for leave
8 to amend if the proposed amendment fails to state a claim upon which relief may be granted.

9 The court will review the motion for leave to amend in due course and will screen the
10 proposed amended complaint under 28 U.S.C. § 1915A. However, absent compelling
11 circumstances, any subsequent motion to dismiss the proposed Second Amended Complaint (if
12 leave is granted to file it) for failure to state a claim filed by Defendants will not be well received
13 inasmuch as the Defendants had an opportunity to assert such arguments in response to Plaintiff's
14 motion to amend and have apparently elected not to do so. The court does not wish to engage in a
15 repetitive analysis. As such, if Defendants wish to assert an argument that the proposed second
16 amended complaint fails to state a claim upon which relief may be granted, they will have
17 **fourteen (14) days** from the date of this Order to do so.

18 **IT IS SO ORDERED.**

19 Dated: September 5, 2019.

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21 WILLIAM G. COBB
22 UNITED STATES MAGISTRATE JUDGE
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